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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 245.

THE MERCANTILE TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

MELVILLE D. HENSEY, DEFENDANT IN ERROR.

Brief for Defendant in Error.

ARTHUR A. BIRNEY,
HENRY F. WOODARD,
For Defendant in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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Brief for Defendant in Error.

The defendant in error, Melville D. Hensey, brought his suit at law, in the Supreme Court of the District of Columbia, against The Mercantile Trust Company, as surety for one William S. Jones, to recover $50,000. He had a verdict for $8,468, and judgment was entered thereon. Upon appeal by the trust company to the Court of Appeals, that court affirmed the judgment, and the trust company sued out a writ of error from this court.

The case as shown by the record is as follows:

Mr. Hensey and William S. Jones, on January 24, 1900, entered into an agreement, by the terms of which Jones agreed to well and sufficiently erect and replace all defective work and finish agreeably to certain drawings

and specifications, and within seven months from the date of the contract, twenty-one dwelling-houses for the consideration of $89,250, to be paid him as the work progressed, in the manner and at the times set out in the schedule of payments agreed to, which provided that the last payment ($16,014) should be made "when the houses are fully completed in accordance with said agreement and plans and specifications prepared therefor." The contract further provided that the owner, Hensey, should furnish the contractor eighty-two mantels free of charge.

It was also specially provided in substance that the work contracted for should be done agreeably to the drawings and specifications made by Melville D. Hensey, architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of the said Bates Warren, or the architect placed in charge by him.

It was also provided that to secure each instalment a certificate—

> "*shall be obtained from and signed by the architect in charge that the contractor is entitled to payment; said certificate, however, in no way lessening the total and final liability of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications, either in execution or materials*" (Rec., p. 28).

For failure to finish the work by the time agreed upon, the contractor agreed to pay $50—

> "for each and every day thereafter the said work shall remain unfinished, as and for liquidated damages" (Rec., p. 28).

The specifications contained the following paragraphs (Rec., p. 29):

> "For material to be furnished and labor to be performed in the erection of twenty-one (21) residences . . . for Mr. Melville D. Hensey, *to be built according to the plans and elevations and detail drawings and these specifications*, prepared by M. D. Hensey, architect, but under the supervision of an architect to be appointed by Bates Warren, said architect to take entire charge.
>
> . . . . . .
>
> "In all cases of *doubt as to the meaning of the drawings* reference is to be made to the architect in charge, whose decision will be final."

To secure the performance by the contractor, Jones, of the above partially recited contract, the said Jones and The Mercantile Trust Company gave their joint bond in the penalty of $50,000 with condition—

> "that if the said principal shall duly and faithfully perform and fulfil all and every the conditions of said contract above recited, on his part to be kept and performed, and shall keep harmless and protect the said obligee from and against all loss by reason of the nonfulfilment by the said principal of the covenants contained in said contract." . . .

the obligation should be void, otherwise to be and remain in full force and virtue (Rec., p. 26).

The Pleadings.

The plaintiff's declaration, as at first filed, contained one count which inaccurately described the bond, and defendant pleaded *non est factum*. The declaration was then amended by adding a second count, and upon this the plaintiff stood at the trial.

The defendant interposed ten pleas as follows: 1st,

performance; 2d, 5th, 6th, 7th, and 9th, set-off; 3d, failure of plaintiff to furnish the mantels contracted for; 4th, failure of plaintiff to pay the whole of the contract price for the buildings; 8th and 10th, payment and discharge.

A demurrer to the third and fourth pleas was sustained on the ground that the requirements that the plaintiff should furnish the mantels and should pay the contract price were not conditions precedent, and that nonperformance thereof could not bar his suit.

To the plea of performance the plaintiff replied by assigning breaches, and claimed that he had been damaged in the sum of $16,500, by reason of failure to complete the houses within the contract time—that is, seven months—and further damaged in the sum of $43,830, because of the failure of defendant's principal to complete and finish the twenty-one houses according to contract, plans, and specifications, which were all intended to cooperate.

To this replication the defendant rejoined as follows:

> "Defendant for a further rejoinder, filed by leave of the court first obtained, to plaintiff's replication (by assignment of breaches) says that by the terms of the contract referred to in the said written obligation, it is, among other things, provided in substance as follows: That the work therein contracted for should be done agreeably to the drawings and specifications made by Melville D. Hensey, architect, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of the said Bates Warren, or the architect placed in charge by him. The said Bates Warren, pursuant to the terms of said contract, appointed William J. Palmer as the architect; that said work was completed by the said William S. Jones, and the defendant acting for him, in a good, workmanlike,

and substantial manner, to the satisfaction and under the direction of the said William J. Palmer, and according to his interpretation of said plans and specifications, and that he, the said Wm. J. Palmer, has testified to such completion by writing or certificate under his hand in the following language:

'*July 29, 1901.*

BATES WARREN, Esq.,
Washington, D. C.

DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses, located on Vernon, California, Kalorama, and Belmont avenues, by The Mercantile Trust Company, of Pittsburg. The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications, it has been where the same has been inconsistent and ambiguous; and in all cases of inconsistency and ambiguity the work has been done according to the interpretation most beneficial to the houses.

Yours very truly,

W. J. PALMER.'"

To this rejoinder the plaintiff demurred on the ground that by the terms of the contract the certificate of the architect set out in the rejoinder is not a bar to the right of the plaintiff to recover for the defects, omissions, and alterations set out in the assignment of breaches (Rec., p. 23).

The demurrer was sustained (Rec., p. 23).

Trial was had upon, (*a*) the issues of performance raised by the first plea, (*b*) set-off raised by pleas 2, 5, 6, 7, and 9, and (*c*) payment and discharge raised by pleas 8 and 10 (Rec., 19, 20).

In his replication assigning breaches of the condition plaintiff averred (1st) failure to complete the houses within the contract time of seven months, and until

July, 1901, to his damage $16,500, and (2d) failure to construct the houses according to the contract, plans and specifications, to his damage $43,830. The items of misconstruction were set out in detail.

The jury after allowing all the items of set-off, as required by the court, awarded the plaintiff $8,468.

The Evidence.

The plaintiff proved that the buildings were not completed until after August 24, 1901, or more than one year after the time fixed by the contract (Rec., p. 29), and this was not controverted.

He also proved (over the objection of the defendant that the certificate of the architect was conclusive against the claim) that the houses were not built according to the plans and specifications, and that the difference in value of the houses, by reason of the omissions, structural defects, and defective materials, was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract (Rec., p. 29).

The defendant met this proof: first, by insisting that the houses were built according to contract, and, second, by insisting that however great the departure from the contract in the manner of building, a certificate from William J. Palmer afforded the defendant immunity.

It was shown that Mr. Palmer was appointed architect April 19, 1901, (fifteen months after the date of the contract, and eight months after the time fixed for its completion); that he thereafter supervised the work on eighteen of the houses, having nothing to do with the other three (Rec., p. 31), and that on July 29, 1901, he reported the completion of the work; that it had been done according to *his interpretation* of the plans and specifications, and that deviations were made only where

the plans and specifications were inconsistent or ambiguous (Rec., pp. 31, 32).

Upon cross-examination, Mr. Palmer testified in substance—

> "that a large part of the work upon the houses in question was completed when he commenced his supervision; that he did not regard it as his duty to change conditions then, excepting where the brickwork had been destroyed by vandalism, and tore nothing down unless it was in danger of falling down. Had nothing to do with the work which was already done, and was only to supervise the completion of the work."

He admitted that on June 17, 1901, he wrote a party in interest, concerning alleged defects in the work:

> "You will appreciate the difficulty of my position. Having very recently been appointed (April 19, 1901) as architect in charge, my position really becomes rather referential than administrative and supervisory."

The witness explained that by this statement he meant that most of the work had been done, and it was difficult for him to rectify work that was already done badly. (Rec., p. 32.)

The specific imperfections and omissions shown in evidence are set out in the assignment of breaches at pages 7, 8, 9 of the record.

The court held in substance:

1. That plaintiff might recover $50 for each day the work remained unfinished after the seven months fixed by the contract.

2. That he might recover for failure to build according to the contract and that the measure of his recovery on this ground was "the difference between what the houses were worth when completed and what they would have

been worth had they been completed as required by the contract."

3. That defendant should recover the several sums claimed by its pleas of set-off.

4. That the architect's certificate was not conclusive that the houses were built according to contract.

5. That wherever there was a doubtful question between the drawings and the specifications, it was the duty of the architect to decide it, and his decision thereon was final and conclusive unless made in bad faith.

In the Court of Appeals the plaintiff in error presented five propositions for the opinion of that court, as well appears from the opinion. They were: (1) The architect's certificate of completion is conclusive that the houses were completed according to contract. (2) Assuming that the houses were not completed in accordance with the plans and specifications, there is no proof in the cause that any damages were sustained by Mr. Hensey. (3) Under the bond the surety is not liable for delays, or, if liable, is not bound by the stipulation for liquidated damages. (4) Delivery of the mantels and payment of the entire contract price are conditions precedent to the right of the owner to sue. (5) The motion in arrest of judgment should have been granted (Rec., pp. 41–46).

The Assignments of Error.

In this court the plaintiff in error reduces its contentions to two:

First. That no basis was furnished by the testimony upon which the jury, *under the instructions given by the court* could have estimated damages.

Second. That the architect's certificate was conclusive on the parties.

I.

A False Assignment.

The argument under the first assignment is based wholly upon the proposition that the trial court *granted* the twelfth of defendant's prayers for instructions, which asked that in considering the question of structural defects, the jury should consider nothing but omissions, and should not consider substitutions of material, or modifications of construction made with the approval of the architect. *The court did not grant this prayer, but rejected it* as contrary to the rulings throughout the case. On page 34 of the record appears the defendant's exception to the rejection, and on page 40 is its assignment of error in the Court of Appeals, for such rejection, in these words: "In refusing to grant defendant's twelfth prayer which reads as follows:" [Here follows the prayer.]

Some confusion is made by an obvious clerical mistake, committed by counsel for plaintiff in error in the making up of the bill of exceptions, which, after reciting that the twelfth prayer was rejected (Rec., p. 34), states (p. 35) that "the court read to the jury prayer number twelve of the defendant (granted)." The comments of the court, immediately following, show that the prayer in question was No. 13, and that this is what was read. This is also made evident by the fact that counsel on neither side suggested any contradiction in the action of the court, counsel for the defendant contenting themselves with objecting only "to so much of the charge of the court as repeated the plaintiff's prayers" (Rec., p. 35), the second of which (Rec., p. 32) like the body of the charge, was distinctly opposed to the theory of defendant's twelfth prayer. In the Court of Appeals there was no suggestion that the court acted both ways on prayer No. 12, or that this prayer was allowed, and, as

already stated, error was assigned for the rejection of the prayer (Opinion, Rec., p. 40). In view of (*a*) the exception to the rejection of the prayer; (*b*) the fact that no suggestion of contradiction in instructions was made to the trial court, or to the Court of Appeals; and (*c*) the assignment of error in the Court of Appeals for the rejection of the prayer, the statement in our opponent's brief (p. 10) that "the trial court granted the twelfth prayer of the defendant," is one which will not commend itself to this court, and requires an explanation not afforded by the brief.

We decline to argue the assignment on any theory which must assume that this twelfth prayer was given. We suggest, however, that the point not having been presented to the Court of Appeals, it will not be considered here.

Jordan Mining Co. *vs.* Société des Mines, 164 U. S., 261, 264.

II.

The Effect of the Architect's Certificate.

The fundamental objection of the defendant to the plaintiff's claim for damages for omissions and defects in the work, is that the architect, Palmer, certified, as shown in the record (p. 31), that the houses were completed, and that the work was done according to his interpretation of the plans and specifications, etc. Since the effect of this certificate must depend upon the contract, we direct the attention of the court to the following parts of the latter document. It is agreed, *first*, that the contractor will finish the houses *agreeably to the drawings and specifications* made by Melville D. Hensey . . . to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate. . . .

Second. That in consideration of the agreement *being strictly performed* by the contractor, Hensey shall pay $89,250, in instalments, as fixed in a signed schedule (p. 28).

Third. That in each case the payment shall be upon certificate of the architect. *"Said certificate, however, in no way lessening the total and final responsibility of the contractor," either for defective work, or work or materials not in accordance with the drawings and specifications.*

Fourth. "In all cases of doubt as to the *meaning of the drawings*, reference is to be made to the architect in charge, whose decision will be final."

There is no provision that the action of the architect shall be final or conclusive, except in the one case—*doubt as to the meaning of the drawings*—upon which point the court carefully guarded the defendant's rights (Rec., p. 35).

We concede that it is competent for parties to agree that the certificate of an engineer, architect, or other person shall be final and conclusive, and that in *such case*, and "in the absence of fraud, or such gross mistake as to necessarily imply bad faith, or failure to exercise an honest judgment, the action of the architect would be final." That this attribute of finality attaches only where the parties have so agreed, either in terms or by *necessary* implication, is clear from the decisions.

Cases of such *express* agreement for conclusiveness which are cited by the other side, are Boettler *vs.* Tendick, 5 L. R. A., 270; Sweeney *vs.* U. S., 109 U. S., 618; Railroad Co. *vs.* March, 114 U. S., 549; Railroad Co. *vs.* Price, 138 U. S., 185; Sheffield, etc., R. R. Co. *vs.* Gordon, 151 U. S., 287; while Kihlberg *vs.* U. S., 97 U. S., 400, is a case of necessary implication, treated by the court as an express agreement.

These cases and others are reviewed in Central Trust

Co. *vs.* Louisville, &c., Ry. Co., 70 Fed. Rep., 282, where, after pointing out that the provision for finality is found in the contracts in those cases where the certificate was held conclusive, the court says:

> "The court should not imply such an agreement, but should require clear and express language, because it is contracting away the right of the party to appeal to the courts of justice in case of a controversy" (p. 285).

Crane Elevator Co. *vs.* Clark, 80 Fed., 705, is not opposed to this view. The architect in that case refused to give a certificate, and the builder sued. The language of the syllabus quoted in the brief for plaintiff in error is not found in the opinion, which says only "That, with respect to *the matter submitted to the umpire*, his decision, is final and conclusive, etc." (p. 708).

Glacius *vs.* Black, 50 N. Y., 145, is exactly in point.

The contract provided that the materials should be of the best quality and the work done in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications. Held, the acceptance by the architect of a different class of work or of inferior material did not bind the owner. The court said:

> "In the first place the contract confers no power upon the architect to change or alter the plans and specifications. *Nor is there any provision found in many such contracts that the decision of the architect shall be final and conclusive.*"

See, also, to the same point:

Bond *vs.* Newark, 19 N. J. Eq., 376.
R. R. Co. *vs.* Wilcox, 48 Pa. St., 161.
Adlard *vs.* Muldoon, 45 Ill., 193.

And the question was considered by the Court of Appeals, D. C., in Fontano *vs.* Robbins (22 App. D. C., 253), where the contract provision was "under the direction and to the satisfaction of" the architects (p. 255). It was held that under such a contract the architect has no power to change the contract; that where the contract does not so provide, an architect is not the general agent of the owner, and has no power to change the plans of the work, and that such provision as that quoted "makes it the duty of the architect to see that the contract is complied with, not violated."

But however it may be in other cases where the architect, agent of the owner, accepts and certifies work as done according to the contract, in this case the certificate can not bind, because:

1st. The right of the owner, *notwithstanding a certificate*, to claim for bad work and inferior materials is expressly reserved to him.

2d. The certificate is so clearly wrong as to prove either fraud or such mistake by the architect as necessarily to imply bad faith, and for this reason is not binding.

Kihlberg *vs.* U. S., 97 U. S., 402.

The first point needs no elucidation. The parties were certainly competent to contract that the architect's certificates *should not be conclusive*, and this is precisely what they did, excepting only as to the meaning of *drawings* (not plans or specifications). No other meaning can be given the proviso (Rec., p. 28); it means this or it means nothing.

As to the second point. The jury found for the plaintiff $8,468.00 after allowing the defendant $29,032 under its pleas of set-off; that is, the plaintiff's total recovery was $37,500. If $16,500 claimed for delays (Rec., p. 7)

be deducted, it will be seen that for building defects the jury allowed $21,000.

These gross defects, amounting to about one-fourth the contract price, the architect ignored. His excuse is—

> "that a large part of the work was completed when he commenced his supervision; that he did not regard it as his duty to change conditions there, except where the brick work had been destroyed by vandalism, and tore nothing down unless it was in danger of falling down; that he had nothing to do with the work which was already done, and was only to superintend the completion of the work; that it was difficult for him to rectify work that was already done badly" (Rec., p. 32).

The certificate carefully avoids a statement that the work was done according to the requirements of the contract; but if it was so intended it can not, in the light of these statements, be taken either as the honest judgment of the architect, or as a certificate contemplated by the contract. The contract contemplated constant supervision of the work. This architect was appointed fifteen months after the contract was signed and when the work was nearly completed. The contract contemplated an honest expression of opinion from one, who, from personal observation of the work, knew the facts to be as certified. Mr. Palmer's testimony shows he recklessly certified to what he knew nothing of and considered not in his province, or that he knew the work to be badly done. This was a fraud, both in fact and in law.

Glacius *vs.* Black, 50 N. Y., 145.

We submit, then, that in granting the thirteenth prayer for instructions, which held the decision of Mr. Palmer on all doubtful questions between the drawings and specifications to be final, unless made in bad faith, the court gave the plaintiff in error all it could rightfully

claim; that there is no basis whatever for a contrary contention, and that the judgment should be affirmed.

We suggest that it is apparent that the writ of error in the cause was taken only for delay, and that damages therefor should be imposed.

Respectfully submitted.

ARTHUR A. BIRNEY,
HENRY F. WOODARD,
For Defendant in Error.